

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
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Amendment of the Commission's )  
Rules Regarding Installment )  
Payment Financing For Personal )  
Communications Services (PCS) )  
Licensees )  
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Amendment of Part I of the )  
Commission's Rules -- )  
Competitive Bidding Proceeding )

WT Docket No. 97-82

**PETITION FOR RECONSIDERATION**

Central Oregon Cellular, Inc. ("COCI") by its attorney and pursuant to section 1.429 of the Commission's rules, 47 C.F.R. §1.429, respectfully requests reconsideration of one aspect of the Second Report and Order in the above-captioned proceeding.<sup>1/</sup> Specifically, COCI urges that the restructuring relief to C Block licensees provided by the Commission through its Restructuring Order be extended to F Block licensees.

**COCI'S INTEREST**

COCI is the Block F licensee in the San Diego Basic Trading Area ("BTA"). COCI is also a bona fide designated entity ("DE"). It has made all required payments to the Commission on time and in full. COCI was licensed on April 28, 1997. Accordingly, it is an interested party in the restructuring proceeding.

<sup>1/</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order, WT Docket No. 97-82, FCC 97-342, 62 Fed. Reg. 55375 (Oct. 24, 1997) ("Restructuring Order").

ARGUMENT

I. The Commission Should Extend Its C Block Relief to F Block Licensees

In the Restructuring Order, the Commission determined not to extend C Block relief to F Block licensees, Restructuring Order, at para. 20. But it devoted only a single paragraph to explaining why. That "explanation" was only that, (a) the nature and extent of financing difficulties facing C Block licensees "appear" to be different than those facing F Block licensees; and (b) C Block licensees paid higher prices, even on a MHz-pop basis. Id.

The F Block licensing scenario is far more complicated than can be discerned from reviewing the Commission's Restructuring Order. Nearly two years before F Block licenses were granted, most A and B Block PCS licenses were issued; and most C Block licenses were granted almost one year earlier than F Block licenses.<sup>2/</sup> Thus, most A, B, and C Block licensees have substantial competitive advantages over their F Block competitors by virtue of having a substantially earlier licensing date. They also have three times as much spectrum. All of this serves to counterbalance the "price" rationale raised by the Commission in distinguishing between C and F Block licensees.

When the Commission elected not to make any of its restructuring options available to F Block licensees, it did not consider any of the above F Block licensing facts. Rather, it

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<sup>2/</sup> "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses" (Public Notice), DA 96-1553, (rel. September 17, 1996).

replied only that the difficulties faced by C and F Block licensees "appear to be different", and that the "C Block prices were higher than F Block prices on average". Restructuring Order, at para. 20.

The Commission's disparate treatment of C and F Block licensees has not, and cannot, be justified. The Commission has not complied with its obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" <sup>3/</sup> Nor has it met its obligation to assure that "all the relevant factors and available alternatives were given adequate consideration". <sup>4/</sup> Rather, the Commission's action is arbitrary and capricious because the Commission provided no reasoned basis as to why the Commission "concluded" what it did. Thus, it includes only a "mere collection of conclusory comments" that cannot support the Commission's action. <sup>5/</sup> Thus, the Commission failed to comply with its threshold obligation to articulate with reasonable clarity its reasons for its decision and identify the significance of the crucial facts. <sup>6/</sup> In fact, the Commission did not really take the

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<sup>3/</sup> Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

<sup>4/</sup> Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413, 1426 (D.C. Cir. 1983) ("Church of Christ").

<sup>5/</sup> See, West Michigan Telecasters, Inc. v. F.C.C., 396 F.2d 688, 691 (D.C. Cir. 1968).

<sup>6/</sup> See, e.g., Section 557(c) of the Administrative Procedure Act, 5 U.S.C. Section 557(c), which provides that all decisions shall contain findings, conclusions and reasons for all material issues of fact, law or discretion. See, also,

required "hard look" at the salient problems, or engage genuinely in reasoned decision making. See, Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (D.C. Cir. 1970).

The Commission also failed to justify why it treated differently two groups of DE licensees. The mere statement that one paid more than another, or that their problems "appear to be different" cannot justify different treatment. See, Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965), where Chief Judge Bazelon chastised the FCC for treating two similarly situated applicants completely differently, especially when both "were considered by the Commission at virtually the same time". There he warned the FCC that, "[W]hatever action the Commission takes on remand, it must explain its reasons...[and] the relevance of those differences to the purposes of the Communications Act". Id.

## **II. The Buy Out Option Should Reflect the Net Present Value of Licenses**

One of the options available to C Block licensees is a cash buy out. Pursuant to this option, 70% of an applicant's total down payment, plus any new funds it can secure can be used to purchase outright licenses at the amount bid, net any bidding credit.<sup>2/</sup> The option does not, however, take into consideration the single most important accommodation the Commission previously provided to DEs: the right to pay for licenses over a period of ten years at an

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Charles H. Koch, Jr., Administrative Law and Practice, 2nd Edition, Westlaw, Section 5.62.

<sup>2/</sup> See, Restructuring Order, at paras. 6, 59-69.

interest rate well below that which would be available through commercial financing. Thus, the license price that must be repaid is a nominal one, rather than an actual one. The true license price must take into consideration the net present value ("NPV") of the bid price.

In order to appreciate fully the need to include an NPV factor into the buy out option, one need only consider the role that deferred payment rights have played in the auction process. The Commission itself recognized the need and utility of such payment rights when it adopted them.<sup>8/</sup> Bidders also recognized this when they determined whether, and how much, to bid.<sup>9/</sup> Indeed, at least one analyst has valued the benefit of deferred payment at a low interest rate as being more valuable than DE bidding credits.<sup>10/</sup> Members of Congress have echoed this position.<sup>11/</sup>

There is no articulation in the Restructuring Order as to why NPV was not applied in calculating buy out prices -- although it appears there may already have been some leniency shown to DE licenses by virtue of their being permitted to utilize down payment

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<sup>8/</sup> See, Fifth Report and Order, 9 FCC Rcd 5532, 5591-94, (1994).

<sup>9/</sup> See, e.g., "The FCC Spectrum Auctions: An Early Assessment", Peter C. Crampton, Journal of Economics and Management Strategy, June 1997.

<sup>10/</sup> See, "Wireless Services, Spectrum Auctions and Competition in Modern Telecommunications", Thomas J. Duesterberg and Peter K. Pitsch, Volume 1, Number 5, p. 11 (May 1997). The authors used a discount rate of 16.5% in their net present value calculations.

<sup>11/</sup> See, The Honorable W. J. "Billy" Tauzin and Edward J. Markey, ex parte letter, September 16, 1997.

monies paid in one market being returned to help buy another market. As demonstrated below, however, this does not serve to justify non-inclusion of the NPV concept.

Most certainly, the NPV concept is sufficiently critical to appropriate resolution of the restructuring issue that the absence of any meaningful discussion of it renders the Commission's restructuring decision indefensible.<sup>12/</sup> When the Commission does address it, it should do so with the intent to assure that its determination furthers, rather than hinders, the intent of Congress when it provided the Commission with auction authority. Clearly, use of NPV serves to further Congressional goals.<sup>13/</sup> It will also further the Commission's goal of minimizing its involvement as a banker. Lastly, the Commission should appreciate that, for single licensees, such as COCI, the current buy out option offers nothing. There is simply no reason to search out private financing and to agree to the considerably higher interest rate, without receiving any benefit for prepayment. The right to use down payment monies for other markets, which offers some benefit to multi-market DE licensees, is not here relevant.

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<sup>12/</sup> See, Motor Vehicle Mfrs, supra. (When making a decision the FCC must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and choice made'." ) See, Also, Church of Christ, supra. (Only where "all relevant factors and available alternatives were given adequate consideration" can a Commission decision be upheld.)


<sup>13/</sup> Among other things, this would foster the goal of Congress to avoid undue concentration in licensees and provide real, not illusory, opportunities to small businesses.

**CONCLUSION**

In view of the above, COCI urges the Commission to reconsider its Restructuring Order as set forth herein.

Respectfully submitted,

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